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November 29, 2010

via electronic filing

Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

RE: Docket No. NOR 42121, Total Petrochemicals USA, Inc. v. CSX Transportation, Inc., et al.

Dear Ms. Brown:

TOTAL Petrochemicals USA, Inc. ("TPI") submits this letter in reply to the "Reply in Opposition to Second Motion to Compel of TOTAL Petrochemicals USA, Inc.," which CSX Transportation, Inc. ("CSXT") served on November 24, 2010. TPI seeks to reply to a single CSXT contention, that the Board should deny TPI's "Second Motion to Compel"("Motion") for the sole reason that it is untimely. Because CSXT's argument is based upon patently false and misleading statements and because TPI did not and could not have known that CSXT would raise this objection, it is imperative that TPI be afforded this opportunity to correct the record.

Although CSXT acknowledges that it agreed to waive the 10-day deadline in the Board's rules for filing motions to compel, CSXT falsely claims that it did so only until September 1, 2010, except for traffic and event data. See CSXT Reply at 6, n. 7. CSXT agreed to waive this deadline in a June 28, 2010 e-mail, and proposed that the parties discuss an alternative deadline at an upcoming discovery meeting (Attachment No. 1).

After reviewing CSXT's discovery objections, TPI again raised the issue of motions to compel, in a July 16, 2010 letter, because CSXT's objections had placed TPI in the position of having to "wait and see" exactly what CSXT would produce before knowing if a motion to compel was truly necessary:

> With regard to many of TPI's Interrogatories and Requests for Production ("RFP"), CSXT has responded with one or more objections and/or limitations while at the same time stating that information and/or documents will be produced. It is possible that CSXT's eventual production of documents will be sufficient for TPI's purposes in this case, and, therefore, TPI is adopting a "wait and see" approach with respect to CSXT's responses. This approach may alleviate the need for not only detailed negotiation

> about what, exactly, CSXT is producing but also recourse to the STB. However, TPI can only take this approach if CSXT agrees to extend its waiver of any objection to a motion to compel as untimely under the Board's rules. Therefore, we ask CSXT to provide this waiver in order to avoid potentially unnecessary discovery disputes.

TPI Motion, Ex. 2, p. 1 (underline added). TPI clearly was aware of the need for a waiver of the 10-day rule, and would not have waited to file its Motion if it did not have that waiver.

In a July 26, 2010 response, CSXT proposed a deadline of September 1, 2010, for both parties to file motions to compel. TPI Motion, Ex. 3, p. 2. In a July 27th e-mail response (Attachment No. 2), TPI noted that September 1 was an unrealistic deadline because TPI had thus far received very little information from CSXT and would require time to review CSXT's production to determine whether it was sufficient. As CSXT itself has repeated *ad infinitum*, the volume of information produced has been sizeable, and in some cases has taken several months for CSXT to produce. Clearly TPI could not reasonably be expected to review such information in a matter of days.

The parties met in person, on August 10, 2010, to discuss their discovery objections, including CSXT's proposed deadline for motions to compel. CSXT represented that it would be producing documents in response to many of TPI's discovery requests despite its objections. TPI pointed out that this process made it very difficult to determine whether a motion to compel would be necessary until TPI actually received and had time to review the information actually produced. TPI reiterated that this process required a "wait and see" approach, which was incompatible with a September 1st deadline for motions to compel.[1] Moreover, similar to CSXT, it was clear that TPI also would not complete its responses to CSXT's discovery requests in time for CSXT to file motions to compel by September 1st. Therefore, the parties concluded their meeting without establishing a deadline for motions to compel. No further discussion of any deadline occurred after that date, because CSXT was continuing to produce information up to and beyond the close of discovery on October 15, 2010.[2] For CSXT to suggest that the parties agreed to a September

[1] CSXT's assertion that its "initial discovery responses left no doubt as to its intentions for each of the objections at issue" in TPI's Motion misses the point. CSXT Reply at 7, n. 8. For example, although CSXT clearly stated that it objected to producing Sensitivity Security Information ("SSI") in RFP Nos. 70, 148, 149 and 158, TPI had no way of knowing what information CSXT would withhold pursuant to that objection, or whether other sources of information produced by CSXT would contain the information needed without resort to SSI, until CSXT actually completed its production. CSXT's argument, however, is beside the point, because CSXT had agreed to waive the 10-day deadline for motions to compel and never retracted that waiver.

[2] CSXT's assertion that its production after October 15 is due to new discovery requests by TPI is incorrect. CSXT Reply at 4-5. TPI has sent many letters to CSXT to obtain missing or incomplete information and to ask for clarifications of CSXT's production. It is disingenuous for CSXT to claim that TPI has only itself to blame for post-

1st deadline for motions to compel, or even that CSXT ever communicated to TPI that its June 28th waiver would expire on September 1st, is absolutely false.

Stand-Alone Cost ("SAC") cases are the most complicated cases litigated before the Board and require extensive discovery. Due to the volume of discovery, there is necessarily a lengthy time between the serving of objections and the actual production of documents. A similar length of time is needed to review the information actually produced. When CSXT raises objections, but states that it will respond subject to its objections, TPI cannot be certain that a motion to compel is necessary until it has received and reviewed the information produced to determine if it is sufficient for TPI's preparation of evidence, despite CSXT's objections. If TPI had filed motions to compel based solely on CSXT's objections by September 1st, TPI would have filed a far more extensive motion to compel in this case, most of which ultimately would have proven to be an unnecessary waste of the parties' and the Board's resources because CSXT's ultimate production was deemed sufficient.

Furthermore, there needs to be sufficient time for the parties to negotiate any discovery disputes, which could avoid the need for resolution by the Board. As noted in the correspondence attached to both TPI's Motion and CSXT's Reply, there has been an extensive dialogue between the parties which has in fact resolved many of their disputes. That correspondence is only a fraction of the actual exchange between the parties over the past four months.

TPI's Second Motion to Compel, far from being dilatory, is a timely, reasonable, and efficient response to CSXT's discovery objections. TPI informed CSXT of the need for a "wait and see" approach to CSXT's objections and obtained CSXT's waiver of the 10-day deadline for motions to compel in order to pursue that approach. Although the parties discussed establishing a September 1st alternate deadline for motions to compel, they never did so precisely because production continued up to and beyond the close of discovery. Both parties acknowledged the efficiency of this approach, which has avoided unnecessary motions by allowing TPI to evaluate the sufficiency of CSXT's actual production and to negotiate compromises to many disputes. As a result, TPI's Motion is narrowly tailored to a small number of discovery requests. TPI reasonably relied upon CSXT's waiver of the 10-day deadline, and the Board should reject CSXT's attempt to renege upon that waiver by falsely claiming that it had only agreed to a September 1st extension of the deadline.

Finally, the Board should reject CSXT's argument as a matter of public policy. If the Board were to deny TPI's Motion as untimely, it would have grave repercussions for SAC cases. All future SAC plaintiffs would file motions to compel immediately upon receiving the railroad's objections. Because railroads seldom produce information contemporaneous with their

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discovery period responses, when those responses are necessitated by CSXT's incomplete production in the first place.

objections, any plaintiff that waits to see what information the railroad actually produces before filing a motion to compel would risk forfeiting it rights to the requested information. This would subject virtually every discovery request to a motion to compel before a plaintiff can know for certain whether a motion is necessary, or even before the plaintiff has an opportunity to negotiate a narrower scope of discovery with the railroad. This will increase the litigation costs for both sides and unnecessarily tax the Board's limited resources.

Sincerely,

Jeffrey O. Moreno
David E. Benz
Counsel for Total Petrochemicals USA, Inc.

Cc: G. Paul Moates
Paul A. Hemmersbaugh
Thomas J. Litwiler
David W. Lawrence
Lamont Jones
Cathy S. Hale
Jeff Collins
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Lucinda K. Butler
G.R. Abernathy
Paul G. Nichini
Joe Martin
Thomas Burden

ATTACHMENT 1

Moreno, Jeffrey

From: Moates, G. Paul [pmoates@Sidley.com]
Sent: Monday, June 28, 2010 5:14 PM
To: Moreno, Jeffrey
Cc: Hemmersbaugh, Paul A.; Gartlan, Jennifer
Subject: Re: TOTAL Discovery

Jeff, Yes we will agree to waive the 10-day rule but not on an open-ended basis. Let's discuss later this week. Paul

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[Sent from my BlackBerry Wireless Handheld]

G. Paul Moates
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pmoates@sidley.com

From: Moreno, Jeffrey <Jeff.Moreno@thompsonhine.com>
To: Moates, G. Paul
Cc: Hemmersbaugh, Paul A.; Gartlan, Jennifer <Jennifer.Gartlan@thompsonhine.com>
Sent: Mon Jun 28 09:25:58 2010
Subject: TOTAL Discovery

Paul,
This note is a follow up to my voice mail message. As you know, the Board's rules provide for motions to compel discovery to be filed within 10 days after the due date for responses. However, given the scope of discovery in SAC cases, the 10 day rule does not leave much time for the parties to review responses and objections, engage in a dialogue over the discovery requests, and then prepare their motions if necessary after completion of their discussions. Therefore, in past cases, the parties have agreed to waive this 10 day rule. Will CSXT agree with TOTAL to waive the 10-day rule in this proceeding?

Best Regards,

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ATTACHMENT 2

Moreno, Jeffrey

From: Moreno, Jeffrey
Sent: Tuesday, July 27, 2010 2:09 PM
To: 'Hemmersbaugh, Paul A.'
Cc: Moates, G. Paul; Benz, David
Subject: TPI Reply to July 26th letter
Follow Up Flag: Follow up
Flag Status: Completed

Paul,

I am writing in reply to your July 26th letter, which responded to my July 16th letter. I agree that we need to move this discussion off of the written page and into a face-to-face meeting. That is why I suggested a meeting in my July 16th letter, after giving you the background of what we wanted to discuss in the letter. I do not agree, however, that it is appropriate to defer any meeting until August 9th. If that means we have to have two meetings to address certain subjects now and other subjects later, then so be it. Time is of the essence, and I am not willing to sit on my hands for two weeks when there are multiple significant issues that can, and should, be addressed now.

TPI served its first discovery requests on May 17th. An August 9th meeting would be just shy of three months later, and only two months before the close of discovery. On top of this, you have proposed a September 1st date for filing motions to compel. It is not at all clear from your letter, however, that TPI will have received sufficient information from CSXT to determine whether a motion to compel is needed by Sept. 1st.

Moreover, the nature of CSXT's discovery responses aggravates this situation. For nearly every request, CSXT propounded numerous objections followed by a statement that it would produce something. TPI cannot know what that something is until CSXT has actually provided it to TPI and TPI has had time to review it. Furthermore, 18 of CSXT's responses impose a step process that requires CSXT to provide a list of documents for TPI to review; TPI to identify what documents from the list it wants to review; and TPI to schedule a time with CSXT to review the documents in Jacksonville. For several of those requests (e.g. RFP #29), TPI also will need time to conduct an in-depth analysis of the traffic data to develop its list of documents for review. Therefore, even if CSXT meets TPI's request to produce data in RFP Nos. 20-23 by August 13, the remaining two months in the discovery period will be barely enough time to allow for this analysis and the scheduling of the inspections in Jacksonville.

Although you emphasize the substantial efforts required of CSXT to respond to TPI's discovery requests, CSXT has objected outright to one of TPI's requests that would significantly mitigate CSXT's burden. In RFP #152, as narrowed by my July 16th letter, TPI has requested that CSXT permit TPI to use certain of CSXT's evidence in the Seminole docket. Much of that evidence could be responsive to large portions of TPI's other discovery requests. CSXT does not need to do anything but provide written consent for TPI to use that evidence.

We can schedule a meeting for August 9th, but I am still requesting another meeting sooner to address many issues that are ripe for discussion now and are very time sensitive. I am referring specifically to our recent correspondence regarding the production of track charts in electronic format, which also is relevant to several other TPI requests. The production of computerized data also will speed up our review of the data in order to meet the deadline for close of discovery. As I noted in an earlier e-mail today, I am available anytime this Thursday or Friday to meet at my office or yours.

Best Regards,

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